

# Cayman Islands Trust and Succession Law

UPDATE

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## Recent statutory developments

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### Introduction

2019 has already seen three important legislative changes to Cayman Islands trust and succession law. These cover trust law amendments (including a new statutory Hastings-Bass rule which effectively reverses some of the findings in *Pitt and Futtler*<sup>1</sup>), refinements to the Private Trust Companies Regulations (including a significant reduction in the annual fees and an increased role for the Cayman Islands Monetary Authority<sup>2</sup> (CIMA)) as well as a welcome relaxation of the rules concerning the formal validity of wills disposing of moveable property in the Cayman Islands.

This article summarises each of those changes in turn, starting with the amendments to the Trusts Law.

### Trust Law Amendments

The Trusts (Amendment) Law, 2019 (the **Amendment Law**) was gazetted on 15 May 2019 but is not yet in force. There are five key changes which have been made.

#### 1. *Trust corporations*

The first change is to conform the definitions of 'trust corporation'. There were previously two different ones; one of which applied for the purposes of STAR trusts<sup>3</sup> - at least one trustee of a STAR trust must be a trust corporation - and one for determining who may discharge a retiring trustee - the general rule being that a trustee may not be discharged from their trust unless there is either a trust corporation or two individuals to act as trustees.

A 'trust corporation' is now defined, for both purposes, as a body corporate with a trust licence (restricted or unrestricted) under the Banks and Trust Companies Law, a controlled subsidiary<sup>4</sup> or a registered private trust company (PTC).<sup>5</sup>

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<sup>1</sup> [2013] 2 AC 108.

<sup>2</sup> CIMA is the financial regulator in the Cayman Islands.

<sup>3</sup> A STAR trust is a trust which is governed by Part VIII of the Trusts Law (2018 Revision) the objects of which may be persons or purposes or both: see Duckworth, *STAR Trusts (the Special Trusts (Alternative Regime) Law 1997 Cayman Islands – 2<sup>nd</sup> generation of purpose trusts and more*, 1<sup>st</sup> edn. (Gostick Hall Publications, 1998); Pursall, *Drafting Cayman Islands Trusts*, 1st edn. (Kluwer Law International, 2006), chapter 17 (STAR Trusts).

<sup>4</sup> A 'controlled subsidiary' is a trust company which is a wholly owned subsidiary of a licensed trust company, whose directors and senior officers are directors or senior officers of the licensee or otherwise approved by CIMA and is registered as such. A registered controlled subsidiary can carry on the following business without needing a separate licence: (i) any trust business which is within the scope of the parent company's licence and connected with its trust business (ii) issuing debt instruments and (iii) acting as trustee of a unit trust which is a registered mutual fund without a mutual fund administrator's licence (if the parent has a mutual fund administrator's licence).

## 2. *The rule in Hastings-Bass*

The second (and arguably most significant amendment) concerns the (so called) rule in Hastings-Bass.<sup>6</sup> The amendment takes the form of a statutory codification of the rule and alters some of the findings in the Supreme Court decisions in England in *Pitt and Futter*,<sup>7</sup> including the requirement for a breach of trust by the trustee.<sup>8</sup>

The rule can be summarised as follows:

*"Where trustees act under a discretion given to them by the terms of the trust, in circumstances in which they are free to decide whether or not to exercise that discretion, but the effect of that exercise is different from that which they intended, the court will interfere with their action if it is clear that they would not have acted as they did had they not failed to take into account considerations which they ought to have taken into account or taken into account considerations which they ought not to have taken into account."*<sup>9</sup>

The rule was part of Cayman Islands law before the enactment of the Amendment Law and has been applied a number of times by the Cayman Islands courts.<sup>10</sup>

The new statutory rule has the following key features:

- 2.1. The rule applies to the exercise of a 'fiduciary power'. That is defined widely to mean "...any power that, when exercised, must be exercised for the benefit of or taking into account the interests of at least one person other than the person holding the power."<sup>11</sup> It is therefore wide enough to cover decisions by directors of a company.<sup>12</sup>
- 2.2. A 'power' includes discretion as to how to exercise an obligation, and a 'person holding a power' includes any person to whom its exercise has been delegated.<sup>13</sup>
- 2.3. The test the court needs to apply is that the person holding the power:
  - 2.3.1. failed to take into account a relevant consideration or took into account an irrelevant consideration (and those considerations may be of fact or law or both);<sup>14</sup> and
  - 2.3.2. but for 2.3.1, that person would either not have exercised the power, or would have exercised it on a different occasion or in a different manner.<sup>15</sup>
- 2.4. Where the court is satisfied that the test has been met in relation to the exercise of a power, it may:
  - 2.4.1. set it aside, in whole or in part, and either unconditionally or on such terms and subject to such conditions as the court may think fit; and
  - 2.4.2. make such order, consequent upon the setting aside of the exercise of the power, as it thinks fit.<sup>16</sup>
- 2.5. To the extent that the exercise of the power is set aside by the court, it is treated as never having occurred.<sup>17</sup>

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<sup>5</sup> Trusts Law (2018 Revision), s.2.

<sup>6</sup> *Hastings-Bass v IRC* [1975] Ch.25.

<sup>7</sup> *Pitt and Futter* [2013] 2 AC 108.

<sup>8</sup> Trusts Law (2018 Revision), s.64A.

<sup>9</sup> *Sieff v Fox* [2005] 1 WLR 381, at 119, cited with approval in the Cayman Islands Grand Court by Smellie CJ in *In The Matter Of The Ta-Ming Wang Trust* 12th April 2010 (Cause No. FSD 89 Of 2010) at 24.

<sup>10</sup> *A v Rothschild Trust Cayman Limited* [2004-05] CILR 485; *Barclays v Private Bank & Trust (Cayman) Ltd v Chamberlain* Grand Court Cause No. 475 of 2004 (unreported); *In The Matter Of The Ta-Ming Wang Trust* 12th April 2010 (Cause No. FSD 89 of 2010).

<sup>11</sup> Trusts Law (2018 Revision), s.64A(7).

<sup>12</sup> See also *In The Matter of The Ta-Ming Wang Trust* 12th April 2010 (Cause No. FSD 89 of 2010) at 27.

<sup>13</sup> Trusts Law (2018 Revision), s.64A(7).

<sup>14</sup> Trusts Law (2018 Revision), s.64A(2)(a).

<sup>15</sup> Trusts Law (2018 Revision), s.64A(2)(b).

<sup>16</sup> Trusts Law (2018 Revision), s.64A(1).

<sup>17</sup> Trusts Law (2018 Revision), s.64A(3).

- 2.6. Importantly, the test may be satisfied without any allegation or proof of any breach of trust or duty by the holder of the power or by any person advising them.<sup>18</sup>
- 2.7. No order may prejudice a bona fide purchaser for value without notice.<sup>19</sup>
- 2.8. Standing to apply to court is conferred on:
  - 2.8.1. the person holding the power;
  - 2.8.2. in relation to a trust, any trustee, any person beneficially interested under the trust or an enforcer (in relation to a purpose trust);
  - 2.8.3. in respect of charity, the attorney-general; and
  - 2.8.4. with leave of the court, any other person.<sup>20</sup>

### 3. *Variation of Trusts*

The court has power to approve a variation of a trust on behalf of (i) minor beneficiaries or those subject to an incapacity; (ii) any person who may become entitled to an interest at a future date or on the happening of a future event; (iii) any unborn person; and (iv) any person who has a contingent interest under a protective trust where the interest of the principal beneficiary has not yet failed or determined.<sup>21</sup>

The test under the previous law was that, except in relation to those persons under category (iv), the court had to be satisfied that the proposed variation was for the 'benefit' of those persons on whose behalf it was approving the variation.

The new test is that the court may approve a variation provided it is not to the detriment of that person.<sup>22</sup>

### 4. *Compromise of disputes*

The court has an inherent jurisdiction to approve a compromise of disputes over the destination of trust property on behalf of minor, unborn and unascertained persons, but, under the previous common law test: "*...will approve a compromise on behalf of a person only if it is for that person's benefit.*"<sup>23</sup>

That test has now been changed so that the court may approve a compromise if it is satisfied that it is not to the detriment of that beneficiary.<sup>24</sup>

### 5. *Firewall*

The Cayman Islands was one of the first jurisdictions to introduce comprehensive conflict of laws provisions for trusts, when it enacted the Trusts (Foreign Element) Law in 1987, which is now part of the Trusts Law (2018 Revision). One of the key provisions is that which excludes the operation of foreign law in relation to foreign forced heirship, matrimonial and similar claims, often referred to as the 'firewall'.

The previous firewall provided that no trust governed by Cayman Islands law and no disposition of property to be held on a Cayman Islands trust is:

*"...void, voidable, liable to be set aside or defective in any fashion nor is the capacity of any settlor to be questioned, nor is the trustee, any beneficiary or any other person to be subjected to any liability or deprived of any right, by reason that...it avoids or defeats any rights, claims or interests conferred by foreign law upon any person by reason of a personal relationship to the settlor or by way of heirship rights, or contravenes any*

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<sup>18</sup> Trusts Law (2018 Revision), s.64A(4); this effectively reverses the Supreme Court decision in *Pitt and Futter* [2013] 2 AC. 108.

<sup>19</sup> Trusts Law (2018 Revision), s.64A(6).

<sup>20</sup> Trusts Law (2018 Revision), s.64A(5).

<sup>21</sup> Trusts Law (2018 Revision), s.72(1).

<sup>22</sup> Trusts Law (2018 Revision), s.72(1) (inserted by the Amendment Law, s.4).

<sup>23</sup> Lewin on Trusts, 19<sup>th</sup> edn. (Sweet & Maxwell, 2015) at 45-010 (Compromises).

<sup>24</sup> Trusts Law (2018 Revision), s.64B.

*rule of foreign law or any foreign, judicial or administrative order or action intended to recognise, protect, enforce or give effect to any such rights, claims or interests.*"<sup>25</sup> [Emphasis added].

The reference to "personal relationship" includes marriage, so protects a Cayman Islands trust from challenge by a spouse of the settlor on divorce. This protection has now been expanded so it refers to personal relationships to "*any beneficiary (whether discretionary or otherwise)*" so will protect from challenges by a spouse of a beneficiary as well as well as a spouse of a settlor.<sup>26</sup>

### Private Trust Companies (Amendment) Regulations, 2019

The Private Trust Companies Regulations (2013 Revision) permit trust companies to act as trustee of trusts without the need to obtain a trust licence, subject to certain conditions. Those regulations have been amended, with effect from 1 February 2019. There are seven key amendments.

#### 1. *Right for CIMA to inspect records*

CIMA now has a right at all reasonable times to inspect all documents and records of the PTC which are held or should be held at the registered office.<sup>27</sup>

#### 2. *Obligation to keep financial records at the registered office*

The PTC now has an obligation to maintain all its financial and transactional records, both in its personal capacity and in relation to its connected trust business, at its registered office.<sup>28</sup>

This means that the documents the PTC must now keep at the registered office are copies of the trust deed or other documents which contain:

- 2.1. the terms of the trust;
- 2.2. the name and address of the trustee;
- 2.3. the name and address of any contributor to the trust;
- 2.4. the name and address of any beneficiary to whom a distribution is made from the trust;
- 2.5. any deed or other document varying the terms of the trust; and
- 2.6. all financial and transactional records of the PTC and its connected trust business.<sup>29</sup>

#### 3. *Additional filing obligations*

The PTC has a new obligation, on the application for registration with CIMA, to file proof of the identification of the directors and shareholders of the PTC,<sup>30</sup> but the obligation to file details of the shareholders or members only applies if there are any members, so implicitly acknowledging that a PTC may be a foundation company – indeed, a number of them have now been incorporated.<sup>31</sup>

#### 4. *Reduction in annual registration fee*

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<sup>25</sup> Trusts Law (2018 Revision), s.91.

<sup>26</sup> Trusts Law (2018 Revision), s.91(b).

<sup>27</sup> Reg. 3(1A).

<sup>28</sup> Reg. 3(2)(f).

<sup>29</sup> Reg. 3(2).

<sup>30</sup> Reg. 4(2)(aa).

<sup>31</sup> As to foundation companies generally, see Tony Pursall, *Cayman Islands foundation companies revisited*, *Trusts & Trustees*, Volume 24, Issue 6, 1 July 2018, pages 541–546.

The annual fee has been halved – from CI\$7,000 (US\$8,536.59) to CI\$3,500 (US\$4,268.29)<sup>32</sup> – but there is now a surcharge for late payment of one-twelfth of the annual fee for every month or part month that it is not paid.<sup>33</sup>

#### 5. *Obligation to file changes to information*

The PTC now has an express obligation to file notice of any changes to the relevant information within 30 days of the change.<sup>34</sup>

#### 6. *Directors*

The board of the PTC must include a natural person. That applies to all PTCs applying for registration on or after 1st February 2019 and to all existing PTCs which make any changes to the board of directors on or after that date.<sup>35</sup>

#### 7. *Refusal and cancellation of registration*

CIMA may refuse or cancel a PTC registration if:

- 7.1. the PTC requests cancellation; or
- 7.2. CIMA has reasonable grounds to believe that the PTC or any principal of a PTC is (a) conducting business in breach of the AML Regulations or (b) is not or ceases to be a fit and proper person.<sup>36</sup> For these purposes, a 'principal' is (simplifying slightly) a director, a person with 10% or more voting control or someone in accordance with whose directions the directors are accustomed to act.<sup>37</sup>

There is a CI\$300 (US\$365.85) cancellation fee.<sup>38</sup>

### **The Formal Validity Of Wills (Persons Dying Abroad) Law, 2018**

Under the previous common law rules which applied in the Cayman Islands, a will disposing of movable assets in the Cayman Islands had to be formally valid in accordance with the law of the deceased's last domicile. This meant that a will executed in accordance with the formal requirements under Cayman Islands law was not valid if it did not comply with the rules of the deceased's last domicile. It also meant that a will which had been validly executed in accordance with the testator's domicile at the time of execution would not be valid if he or she had changed domicile before death and the will was not formally valid under the rules of the new domicile.

The common law rules have now been abolished and the new rules came into effect on 1st February 2019.<sup>39</sup> The new law applies to a person who dies on or after 1st February 2019 who is not domiciled in the Cayman Islands,<sup>40</sup> other than a will disposing of immovable property or any interest in land in the Cayman Islands. In those circumstances, the will is valid if it is executed in accordance with the law of:

- (a) the Cayman Islands;
- (b) the territory where the will was executed;

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<sup>32</sup> Reg 4(2)(b).

<sup>33</sup> Reg 4(2A).

<sup>34</sup> Reg. 4(4).

<sup>35</sup> Reg. 4A.

<sup>36</sup> Reg. 4B.

<sup>37</sup> Reg 2(b).

<sup>38</sup> Reg. 7.

<sup>39</sup> The Formal Validity Of Wills (Persons Dying Abroad) Law, 2018 (Commencement) Order, 2019.

<sup>40</sup> The Formal Validity of Wills (Persons Dying Abroad) Law, 2018, s.3.

- (c) the territory where the deceased was domiciled or habitually resident, either at the date of its execution or at the date of death; or
- (d) the state of which the deceased was a national at the time of its execution or at the date of death.<sup>41</sup>

The new rules will apply to wills executed before 1st February 2019, where the deceased dies on or after that date.

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<sup>41</sup> The Formal Validity of Wills (Persons Dying Abroad) Law, 2018, s.4(1).

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